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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33

1. In resolution 1998/43, the Commission on Human Rights requested its Chairman to appoint an independent expert to prepare a revised version of the basic principles and guidelines elaborated by Mr. Theo van Boven with a view to their adoption by the General Assembly [1] Pursuant to paragraph 2 of resolution 1998/43, the Chairman of the Commission on Human Rights appointed Mr. M. Cherif Bassiouni to carry out this responsibility.

2. The present report is submitted pursuant to Commission resolution 1999/33 in which the Commission requested "the independent expert to complete his work and submit to the Commission at its fifty-sixth session, in accordance with the instructions issued by the Commission in its resolution 1998/43, a revised version of the basic principles and guidelines prepared by Mr. Theo van Boven (E/CN.4/1997/104, annex), taking into account the views and comments of States and of intergovernmental and non-governmental organizations" and decided to continue its consideration of this matter at its fifty-sixth session under the agenda sub-item entitled "Independence of the judiciary, administration of justice, impunity"

3. The independent expert's initial efforts in preparing a revised version of the draft guidelines and principles included an assessment of the previous drafts of the basic principles and guidelines elaborated by Mr. van Boven and their comparison with other United Nations norms and standards concerning victim redress.[2] Specifically, the prior drafts were examined in light of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex), pertinent provisions of the Rome Statute of the International Criminal Court (A/CONF.189/9),[3] and other relevant United Nations norms and standards. This assessment was submitted to the Commission on Human Rights as the independent expert's first report (E/CN.4/1999/65), pursuant to resolution 1998/43.

4. In preparing the revision of the principles and guidelines, the independent expert benefited from the foundation provided by prior reports as well as by comments made by several Governments on the earlier draft that was the basis of the independent expert's revision. These comments were provided by the Governments of Benin, Chile, Colombia, Croatia, Germany, Japan, Paraguay, the Philippines, Sweden, and Uruguay. Comments were also received from various United Nations bodies, intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations.[4]

5. The independent expert held two consultative meetings in Geneva for all interested Governments, intergovernmental organizations and non-governmental organizations. These meetings were held on 23 November 1998 and 27 May 1999, respectively and were well attended. The comments made were useful to the independent expert who took them into account in formulating his revision.

6. On the basis of these consultations and prior comments, the independent expert circulated a first draft of his revision of the principles and guidelines on 1 June 1999 to all Governments, intergovernmental organizations and non-governmental organizations for their comments. A second revised draft was then prepared by the independent expert and circulated on 1 November 1999 to Governments, intergovernmental organizations and non-governmental organizations. The independent expert received comments on these drafts from the Governments of Argentina, Burkina Faso, Colombia, Cuba, France, Germany, Japan, the Netherlands, Peru, Singapore, the Syrian Arab Republic, and the United States of America. In addition, comments were received from the International Committee of the Red Cross and several non-governmental organizations and individual experts.[5] Based on the comments received on these two drafts, the independent expert drafted the principles and guidelines annexed to the present report.

7. The independent expert prepared the principles and guidelines in a manner that is in keeping with existing international law, taking into account all relevant international norms arising from treaties, customary international law, and resolutions of the General Assembly, the Economic and Social Council, the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights.

8. The expert felt bound by the essential elements of the draft on which his mandate was based. That draft treated jointly the subjects of violations of international human rights law and violations of international humanitarian law. Prior drafts had used the terms "gross violations of

human rights" and "jus cogens violations". However, a number of Governments and organizations felt that these terms were insufficiently precise, and as a result the independent expert has opted to refer to certain types of violations as "crimes under international law". Principles 3 to 7, which make reference to "crimes under international law", represent extant norms of international law. The principles and guidelines use the word "shall" for existing international obligations and the word "should" for emerging norms and existing standards.

9. The principles and guidelines were also drafted with a view to their being applied in light of future developments in international law. For example, the terms "violations", "human rights law", and "international humanitarian law" were not defined. Aside from the fact that these are well-understood concepts, their specific content and meaning are likely to evolve over time.

10. The independent expert extends his appreciation to those Governments, organizations and individuals who contributed comments during the drafting process and to the Office of the High Commissioner for Human Rights for its support.

Notes

[1] Pursuant to its resolution 1989/13, the Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Mr. van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8), which ultimately resulted in draft basic principles and guidelines (E/CN.4/1997/104, annex). The Commission on Human Rights, in its resolution 1996/35, regarded the proposed draft basic principles elaborated by Mr. van Boven as a useful basis for giving priority to the question of restitution, compensation and rehabilitation.

[2] Mr. van Boven prepared three versions of the basic principles and guidelines on the right to reparation for victims. The first version is found in document E/CN.4/Sub.2/1993/8 of 2 July 1993, section IX. The second version is found in document E/CN.4/Sub.2/1996/17 of 24 May 1996. The third version is found in document E/CN.4/1997/104 of 16 January 1997. In addition, the independent expert examined the work of Mr. Louis Joinet, who, in his capacity as Special Rapporteur of the Sub-Commission on the question of the impunity of perpetrators of violations of human rights (civil and political), developed basic principles and guidelines on impunity. Two versions of these guidelines (E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997) were analysed insofar as they related to reparation for victims of human rights violations.

[3] See also The Statute of the International Criminal Court: A Documentary History, M. Cherif Bassiouni (ed.), 1999.

[4] These bodies and organizations were: Catholic Women's League Australia, European Court of Human Rights, Federación de Mujeres Cubanas, General Arab Women Federation, International Commission of Jurists, International Labour Office, International Police Association, International Rehabilitation Council for Torture Victims, Organization for Economic

Cooperation and Development, Redress Trust, Transnational Radical Party, United Nations Children's Fund (UNICEF), United Nations Economic Commission for Latin America and the Caribbean, United Nations Office for Drug Control and Crime Prevention, Unión Dominicana de Periodistas Pro la Paz.

[5] These organizations were: Amnesty International, Parliamentarians for Global Action-International Law and Human Rights Programme, International Centre for Criminal Law Reform, Redress Trust, Group Project for Holocaust Survivors and their Children, International Commission of Jurists and INTERIGHTS.

Annex

BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

The Commission on Human Rights,

Pursuant to Commission on Human Rights resolution 1999/33 of 26 April 1999, entitled "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms", in which the Commission took note with appreciation of the note of the Secretary-General (E/CN 4/1999/53) submitted in compliance with resolution 1998/43 of 17 April 1998 and the report of the independent expert (E/CN 4/1999/65),

Recalling resolution 1989/13 of 31 August 1989 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in which the Sub-Commission decided to entrust Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, which was contained in Mr. Van Boven's final report (E/CN 4/Sub 2/1993/8) and which resulted in draft basic principles and guidelines (E/CN 4/1997/104, annex), and resolution 1994/35 of 4 March 1994 of the Commission on Human Rights in which the Commission regarded the proposed basic principles and guidelines contained in the study of the Special Rapporteur as a useful basis for giving priority to the question of restitution, compensation and rehabilitation,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights and humanitarian law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 11, and the Convention on the Rights of the Child at article 39,

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully

respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims,

Recalling resolution 1989/57 of 24 May 1989 of the Economic and Social Council, entitled "Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", as well as Council resolution 1990/22 of 24 May 1990, entitled "Victims of crime and abuse of power",

Noting that in resolution 827 (1993) of 25 May 1993 in which it adopted the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law",

Noting with satisfaction the adoption of the Rome Statute of the International Criminal Court on 17 July 1998 which obliges the Court to "establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" and obliges the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented point of departure, the community, at local, national and international levels, affirms its human solidarity and compassion with victims of violations of international human rights and humanitarian law as well as with humanity at large,

Decides to adopt the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law as follows:

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND ENFORCE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

1. Every State has the obligation to respect, ensure respect for and enforce international human rights and humanitarian law norms that are, inter alia:

(a) Contained in treaties to which it is a State party;

(b) Found in customary international law, or

(c) Incorporated in its domestic law.

2. To that end, if they have not already done so, States shall ensure that domestic law is consistent with international legal obligations by:

(a) Incorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective and prompt reparation as defined below; and

(d) Ensuring, in the case that there is a difference between national and international norms, that the norm that provides the greatest degree of protection is applied.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, inter alia, a State's duty to:

(a) Take appropriate legal and administrative measures to prevent violations;

(b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;

(c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;

(d) Afford appropriate remedies to victims; and

(e) Provide for or facilitate reparation to victims.

III. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations.

5. To that end, States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate

legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses.

IV. STATUTES OF LIMITATIONS

6. Statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law.

7. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.

V. VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

8. A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.

9. A person's status as "a victim" should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

VI. TREATMENT OF VICTIMS

10. Victims should be treated by the State and, where applicable, by intergovernmental and non-governmental organizations and private enterprises with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety and privacy as well as that of their families. The State should ensure that its domestic laws, as much as possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS' RIGHT TO A REMEDY

11. Remedies for violations of international human rights and humanitarian law include the victim's right to:

(a) Access justice;

(b) Reparation for harm suffered, and

(c) Access the factual information concerning the violations

VIII. VICTIMS' RIGHT TO ACCESS JUSTICE

12. A victim's right of access to justice includes all available judicial, administrative, or other public processes under existing domestic laws as well as under international law. Obligations arising under international law to secure the individual or collective right to access justice and fair and impartial proceedings should be made available under domestic laws. To that end, States should:

(a) Make known, through public and private mechanisms, all available remedies for violations of international human rights and humanitarian law;

(b) Take measures to minimize the inconvenience to victims, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to a remedy and reparation for violations of international human rights or humanitarian law.

13. In addition to individual access to justice, adequate provisions should also be made to allow groups of victims to present collective claims for reparation and to receive reparation collectively.

14. The right to an adequate, effective and prompt remedy against a violation of international human rights or humanitarian law includes all available international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.

IX. VICTIMS' RIGHT TO REPARATION

15. Adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.

16. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms.

17. In cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim.

18. In the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide reparation to victims who have sustained bodily injury or impairment of physical or mental health as a result of these violations and to the families, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these.

19. A State shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations.

20. In cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims.

X. FORMS OF REPARATION

21. In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.

22. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

23. Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities, including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity; and

(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

24. Rehabilitation should include medical and psychological care as well as legal and social services.

25. Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;

(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;

(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(f) Judicial or administrative sanctions against persons responsible for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;

(i) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting persons in the legal, media and other related professions and human rights defenders;

(v) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials;

(vi) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;

(vii) Creating mechanisms for monitoring conflict resolution and preventive intervention

XI. PUBLIC ACCESS TO INFORMATION

26. States should develop means of informing the general public and in particular victims of violations of international human rights and humanitarian law of the rights and remedies contained within these principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.

XII. NON-DISCRIMINATION AMONG VICTIMS

27. The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and be without any adverse distinction founded on grounds such as race, colour, gender, sexual orientation, age, language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability.

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